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Sayat Ahmad bin Nazir Ahmad v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05–42–03 OF 2012
AZAHAR MOHAMED, ROHANA YUSUF AND HAMID SULTAN JJCA
30 DECEMBER 2013

C

Criminal Procedure — Dangerous drugs — Trafficking — Whether there was clear evidence of trafficking under s 2 of the Dangerous Drugs Act 1952 — Whether evidence of negotiations between accused and agent provocateur for sale and purchase of drugs amounted to trafficking — Whether trial court's failure to state provision of law under which accused found to have trafficked not fatal to case or prejudicial to accused — Whether accused had every opportunity to raise reasonable doubt on prosecution's case but failed in that regard

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The appellant was convicted and sentenced to death by the High Court for trafficking in 26.64g of dangerous drugs, made up of 12.98g heroin and 13.66g monoacetylmorphines, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). In his instant appeal against conviction and sentence, the appellant contended there was a fatal failure on the trial judge's part to state, in her judgment, the provision of the law she relied upon to conclude that trafficking had been established. As a result, the appellant said, there was, inter alia, a possibility the trial judge may have infringed the rule against relying upon double presumptions under the DDA to find a case of trafficking. The prosecution's case was that the appellant was caught carrying a bag containing the drugs by a police party which lay in ambush whilst the appellant met with a police officer ('SP6') who posed as a buyer for the drugs. It was the prosecution's evidence that SP6 had earlier met with the appellant and discussed and finalised the details of the sale and purchase. In his defence, the appellant denied ever meeting SP6 before the arrest and also denied knowledge of the drugs. He said he was arrested while merely doing an errand for a friend to deliver the bag. The trial court found the defence failed to raise a reasonable doubt on the prosecution's case.

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Held, dismissing the appeal and affirming the conviction and sentence:

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(1) On the evidence, a case of trafficking under s 2 of the DDA was made out. Such a finding did not require the trial court to invoke a presumption of possession, custody or control because there was direct evidence of trafficking under s 2 from the evidence on negotiations for the sale and purchase of the drugs between the appellant and SP6 (see para 13).

(2) The trial court's failure to state clearly in its judgment that the prosecution had made out a case of trafficking under s 2 of the DDA was not fatal to the case nor prejudicial to the appellant as the evidence of trafficking was clear and remained unrebutted. There was no miscarriage of justice as the appellant had had every opportunity to raise a reasonable doubt on the prosecution's case. The trial judge, in her judgment, gave due consideration to the appellant's defence and she found he had failed to raise any reasonable doubt on the prosecution's case (see para 15).

[Bahasa Malaysia summary

Perayu disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedar dadah berbahaya seberat 26.64g, terdiri daripada 12.98g heroin dan 13.66g monoacetylmorphines, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dalam rayuannya ini terhadap sabitan dan hukuman, perayu berhujah bahawa terdapat kegagalan serius oleh pihak hakim perbicaraan untuk menyatakan, di dalam penghakimannya, peruntukan undang-undang yang beliau guna pakai untuk memutuskan bahawa pengedaran telah dibuktikan. Akibatnya, perayu menyatakan, terdapat, antara lain, kemungkinan hakim perbicaraan melanggar peraturan terhadap menggunapakai anggapan berganda di bawah ADB untuk memutuskan kes untuk pengedaran. Kes pihak pendakwaan adalah bahawa perayu ditangkap membawa beg yang mengandungi dadah oleh pasukan polis yang sedang serang hendap semasa perayu berjumpa dengan pegawai polis ('SP6') yang menyamar sebagai pembeli dadah tersebut. Keterangan pihak pendakwaan bahawa SP6 telah terdahulunya berjumpa dengan perayu dan berbincang dan menyelesaikan butir-butir jual dan beli tersebut. Dalam pembelaannya, perayu menafikan yang dia pernah berjumpa dengan SP6 sebelum penangkapan tersebut dan juga menafikan mengetahui tentang dadah tersebut. Dia menyatakan yang dia ditangkap semasa hanya melakukan kerja untuk kawan bagi menghantar beg tersebut. Mahkamah perbicaraan mendapati pembelaan gagal untuk membangkitkan keraguan yang munasabah ke atas kes pihak pendakwaan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Atas keterangan, kes untuk pengedaran di bawah s 2 ADB telah dibuat. Dapatan sedemikian tidak memerlukan mahkamah perbicaraan untuk membangkitkan anggapan milikan, jagaan atau kawalan kerana terdapat keterangan terus pengedaran di bawah s 2 daripada keterangan atas perundingan untuk jual dan beli dadah tersebut di antara perayu dan SP6 (lihat perenggan 13).

(2) Kegagalan mahkamah perbicaraan untuk menyatakan dengan jelas di dalam penghakimannya bahawa pihak pendakwaan telah membuktikan kes pengedaran di bawah s 2 ADB tidak serius kepada kes atau prejudis kepada perayu memandangkan keterangan pengedaran adalah jelas dan

kekal tidak dipatahkan. Tidak terdapat ketidakadilan memandangkan perayu telah mempunyai setiap peluang untuk membangkitkan keraguan yang munasabah terhadap kes pihak pendakwaan. Hakim perbicaraan, dalam penghakimannya memberi pertimbangan yang sewajarnya kepada pembelaan perayu dan beliau mendapati perayu gagal untuk membangkitkan apa-apa keraguan yang munasabah terhadap kes pihak pendakwaan (lihat perenggan 15).]

Notes

For cases on trafficking, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1929–1932.

Cases referred to

Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685, FC (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599, FC (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 37(da), 39B(1)(a), (2)

Appeal from: Criminal Trial No 45A-17 of 2011 (High Court, Kuantan)

J Kuldeep Kumar (J Kuldeep Kumar & Co) for the appellant.
Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] The appellant was charged and tried at the High Court of Malaya in Kuantan for trafficking in drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the end of the trial the appellant was convicted and sentenced to death under s 39B(2) of the same Act. On 31 July 2013 we heard his appeal. By a unanimous decision we dismissed the appeal and we now give our reasons for our decision.

[2] This case involved an informer and agent provocateur. The prosecution case reveals the following facts. On 8 March 2011 at about 8–9pm, on the instruction of ASP Azli bin Mohd Nor (SP5), constable Mohd Anuar bin Abdullah (SP6), acting as an agent provocateur, met the appellant at area Tomyam, Permatang Badak to discuss a purchase of dangerous drugs. After the negotiation, SP6 informed SP5 that the appellant agreed to supply one pound of heroin at an agreed price of RM14,000. Vide a tele-conversation on 9 March

2011 at about 3.15pm the appellant informed SP6 that the drugs would be delivered later that night. A police team lead by SP5 waited for the appellant at Shell Permatang Badak at about 8.30pm. Thirty minutes later, the appellant was seen walking towards SP6 with a sling bag (exh P6) on him. After SP6 showed the flash role money the appellant showed the drugs. SP6 signalled the police team and they arrested the appellant. The appellant was caught with the sling bag still on him. After the arrest the appellant was brought to the house of SP3 (Mohd Osman) where another person by the name of Hasinah (SD2) was arrested. However SD2 was later released as she was not involved in the commission of the crime.

[3] Exhibit P6 was inspected by SP5 and was found to contain two transparent plastic packets inside a white plastic bag. Both transparent plastic packets contained green substance suspected to be heroin. The items found in the bag were one Timberland wallet (exh P17); RM60,000; two pieces of appellant's photographs; appellant's NRIC (exh P18) and a Nokia cell phone (exh P19).

[4] The finding by the chemist Khairul Hadi bin Haji Abdul Raub (SP4) confirmed that the content of the two plastic packets were 12.98g of heroin and 13.66g of monoacetylmorphine.

[5] After the conclusion of the case for the prosecution, the learned trial judge came to a finding that the prosecution had made out a prima facie case against the appellant and thereupon called upon the appellant to enter his defence.

[6] The appellant elected to give evidence on oath. According to the appellant he and SD2 went to SP3's house two or three days prior to his arrest in order to take care of SP3's wife, Miriam who just gave birth. He said he was at SP3's house on the night of 8 March 2011 when the alleged negotiation took place. He denied that he ever met SP6 until the night of his arrest at Shell Permatang Badak. His version was that he was asked by one Ali Johar to deliver the bag (exh P6), which he was told to contain monies on 9 March 2011 (the date of arrest), to a person at Shell Permatang Badak where he will be paid RM500. He then borrowed SP3's motorcycle and went straight to Shell Permatang Badak. Upon reaching the place he walked to SP6's car, he saw another person in the back seat. He was about to hand over the bag when police officers led by SP5 came and arrested him. The appellant denied that SP6 had shown him a flash role money. Likewise he also denied that he had any knowledge of the drugs on P6. The appellant informed the police that P6 belonged to Ali Johar and that he was delivering P6 on Ali's behalf. He also informed the police that Ali Johar was waiting for him at SP3's house after he delivered the bag.

[7] Having evaluated the defence of the appellant, the learned trial judge found that the appellant had failed to raise any reasonable doubt in the prosecution's case and convicted the appellant as per the charge and accordingly sentenced the appellant to death.

[8] The appellant raised a number of grounds in his petition of appeal. Before us learned counsel confined his argument to only one main issue. He contended that there was a misdirection by the learned trial judge in that she had failed to decide on whether the conviction of the appellant was made under s 2 with the aid of presumption under s 37(da) of the DDA.

[9] Before deliberating on the issue raised, it is pertinent to note the charge against the appellant, which we now produce below:

> Bahawa kamu Sayat Ahmad bin Nazir Ahmad pada 9 Mac 2011, lebih kurang jam 8.30 malam, di kawasan Stesyen Minyak Shell di lot 33408/9 Jalan Kuantan Bypass, di dalam daerah Kuantan, di dalam Negeri Pahang, didapati mengedar dadah berbahaya, berat bersih 26.64 gram (12.98 gram Heroin dan 13.66 gram Monoacetylmorphines) dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[10] We agree with the submission of learned counsel and it was also conceded by learned public prosecutor that in her judgment the learned judge did not say or mention under which section of the DDA the appellant was convicted for trafficking of drugs. There was neither mention of s 37(da) nor any deliberation on s 2 of the DDA in the learned judge's written judgment.

[11] It was the learned counsel's submission that since the learned judge failed to state under which provision of the law she was relying on, she may have relied on s 37(d) read with s 37(da) of the DDA, which would lead to a case of a double presumption and hence in fringing the rule against double present as decide in *Public Prosecutor v Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685, which affirmed the decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273.

[12] We are in agreement with the submission of learned deputy public prosecutor that there was no necessity to invoke a presumption under s 37(d) or s 37(da) on the facts and circumstances of the present case. We say so for the following reasons. On the issue of possession and knowledge the learned judge in para 4 (b) of her judgment has this to say *Tiada kesilapan identiti OKT mengenai orang yang berurusan dengan SP6 dan terjumpanya dadah*

bersama-sama OKT, menunjukkan OKT mempunyai milikan, kawalan, jagaan dan pengetahuan akan dadah yang dirampas. Beban bukti untuk menidakkannya adalah terletak ke atas OKT.

Knowledge may easily be inferred from the facts and circumstances of this case because there was a direct evidence of trafficking under s 2 of the DDA. There was evidence of negotiation on the sale of drugs that took place between the appellant and SP6. There was flash roll money shown to complete the sale process. In the Federal Court case of *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 a case involving agent provocateur, the Federal Court speaking through Chong Siew Fai CJ (Sabah and Sarawak) stated that:

> It was essential to bear in mind that the case of the prosecution was not based on custody or control of the cannabis thereby invoking the presumption of possession, or on possession of 200g or more cannabis thereby attracting the presumption of trafficking under s 37(da) or (da) (iv) of the Act. The prosecution founded its case of trafficking on the sale of the cannabis to the police agent provocateur, the definition of trafficking is wide and includes buying, selling, varying, keeping and concealing dangerous drugs.

[13] From the above decision it is trite that a case of trafficking founded on s 2 of the DDA does not require the court to invoke a presumption of possession, custody or control. This is because a case of trafficking under s 2 of the DDA is sustainable when there is evidence to that effect which necessarily include the buying and selling of dangerous drugs.

[14] In the present case the learned trial judge concluded that an offence of trafficking accordingly was made out when negotiation between the appellant and SP6 took place. Although she did not state the provision in her judgment she made the following findings; *Keterangan SP6 adalah jelas bahawa tawar menawar harga jualbeli dadah telah pun berlangsung di antara SP6 dan OKT. Tawar menawar yang di buat iaitu harga satu paun adalah RM14,000 setelah mendapati diskaun daripada RM15,000. Peguambela berhujah mengenai penggunaan bahasa dan maksud 'bare' yang tidak jelas sama ada ianya menunjuk kepada dadah. Apa yangjelas pada masa pertemuan SP6 dan OKI pada lebih kurang 9 malam adalah mengenai serah menyerah dadah yang hendak dijual oleh OKT dan di beli oleh SP6.* From her conclusion the learned judge was clearly referring to the sale and purchase transaction that had taken place between the appellant and SP6, which constitutes an offence of trafficking under s 2 of the DDA.

[15] We agree with the learned judge that, on the evidence appearing in the appeal records, a trafficking case under s 2 of the DDA was made out. The failure of the learned judge to state clearly in her judgment that the prosecution had made out a case of trafficking under s 2 in our view is not fatal on the facts

of the present case as the evidence of trafficking is clear and remained unrebutted. We stand guided by the Federal Court decision in *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599. In that case the Federal Court held that although there was no mention of statutory presumption under s 37(da) in that case, on evidence adduced and on the failure of both the trial judge and the Court of Appeal to invoke that presumption, it became incumbent upon the Federal Court to invoke the necessary presumption. Applying the same principle, we are of the view that the failure of the learned judge to mention the relevant section of the law in her judgment is not fatal and not prejudicial to the appellant. We do not find any miscarriage of justice since the appellant had every opportunity to raise a reasonable doubt on the prosecution's case. The learned trial judge had also given due consideration to the defence raised by the appellant in her judgment and found that the appellant had failed to raise any reasonable doubt on the prosecution's case.

[16] For the above reasons we do not find merit in the grounds of appeal by the appellant. On a totality of evidence, we find the conviction against the appellant safe. We affirmed the conviction and sentence passed by the learned trial judge.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar